# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>June 26, 2014 |
| v | No. 314315<br>Wayne Circuit Court |
| JOHN OLIVER WOOTEN,<br><br>Defendant-Appellant. | LC No. 11-012794-FC |

Before: MARKEY, P.J., and SAWYER and WILDER, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree murder, MCL 750.317, assault with intent to murder, MCL 750.83, felon in possession of a firearm ("felon-in-possession"), MCL 750.224f, and possession of a firearm during the commission of a felony ("felony-firearm"), MCL 750.227b. He was sentenced, as a second habitual offender, MCL 769.11, to 30 to 50 years' imprisonment for the second-degree murder conviction, 30 to 50 years' imprisonment for the assault with intent to murder conviction, four to seven years' imprisonment for the felon-in-possession conviction, and five years' imprisonment for the felony-firearm conviction. We affirm.

Defendant first argues that, when the trial court granted his motion for a mistrial, it erred when it did not do so with prejudice, which would have barred retrial on double-jeopardy grounds. We disagree.

To preserve appellate review of a double-jeopardy violation, a defendant must object at the trial court level. See *People v Meshell*, 265 Mich App 616, 628; 696 NW2d 754 (2005). Because defendant did not object to the trial court's decision to grant the motion for a mistrial without prejudice, this issue is not preserved. However, double-jeopardy issues "present[] a significant constitutional question that will be considered on appeal regardless of whether the defendant raised it before the trial court." *People v McGee*, 280 Mich App 680, 682; 761 NW2d 743 (2008). This Court reviews "an unpreserved claim that a defendant's double jeopardy rights have been violated for plain error that affected the defendant's substantial rights, that is, the error affected the outcome of the lower court proceedings. Reversal is appropriate only if the plain error resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *McGee*, 280 Mich App at 682. The trial court's factual findings regarding whether the prosecutor "intended to goad the defendant

into moving for a mistrial" are reviewed for clear error. *People v Dawson*, 431 Mich 234, 258; 427 NW2d 886 (1988). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Mullen*, 282 Mich App 14, 22; 762 NW2d 170 (2008).

"No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb." US Const, Am V. "No person shall be subject for the same offense to be twice put in jeopardy." Const 1963, art 1, § 15. The Michigan Constitution's protection against double jeopardy is set forth in the same test used by federal courts, as stated in *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932): "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *People v Smith*, 478 Mich 292, 311; 733 NW2d 351 (2007).

"When a mistrial is declared, retrial is permissible under double jeopardy principles where manifest necessity required the mistrial or the defendant consented to the mistrial and the mistrial was caused by innocent conduct on the part of the prosecutor or judge, or by factors beyond their control." *People v Echavarria*, 233 Mich App 356, 363; 592 NW2d 737 (1999). "Retrials are an exception to the general double jeopardy bar. Where a mistrial results from apparently innocent or even negligent prosecutorial error, or from factors beyond his control, the public interest in allowing a retrial outweighs the double jeopardy bar." *People v Tracey*, 221 Mich App 321, 326; 561 NW2d 133 (1997) (quoting *Dawson*, 431 Mich at 257). "The balance tilts, however, where the judge finds, on the basis of the 'objective facts and circumstances of the particular case,' that the prosecutor intended to goad the defendant into moving for a mistrial." *Id.* (quoting *Dawson*, 431 Mich at 257). "Prosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on [the] defendant's motion . . . does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause." *Oregon v Kennedy*, 456 US 667, 675-676; 102 S Ct 2083; 72 L Ed 2d 416 (1982).

At the first trial, the officer-in-charge, LaTonya Brooks, testified during cross-examination that she was not aware before trial that a second gun had been "present and had been pulled" by Alfonso Thomas, the deceased victim. During redirect examination, the prosecutor attempted to rehabilitate Brooks by asking questions prompting answers to the effect that there was no evidence of a second gun at the scene of the shooting that would have directed the investigation toward Anthony Gary's pistol. The prosecutor then asked, "In this case, would you have enjoyed talking to the [d]efendant?"

Defendant immediately objected, and an on-the-record sidebar conference was held at which the prosecutor explained that he was attempting to rebut defendant's theory that Thomas fired Gary's semiautomatic pistol, which had not been tested by or turned into police, toward defendant, causing defendant to fire back in self-defense. Defendant moved for a mistrial, arguing that the question violated his Fifth Amendment right against compelled self-incrimination, and that the prosecution deliberately asked the improper question so that defendant's forthcoming motion would be granted and the prosecution "would have a second strike" at the case. The prosecution responded that impeaching a defendant with evidence of his prearrest silence was permissible where "it would have been natural for a defendant to come

forward." Because defendant implied, in the course of cross-examining Brooks, that she failed to obtain relevant facts about Gary's gun from Gary and Omar Madison, defendant opened the door to the suggestion that defendant was equally capable of providing Brooks with that information, the prosecution argued.

The trial court found that the facts did not create a situation in which it would have been natural for defendant to come forward because the "charges brought against the defendant were probably almost instantaneous, and then he was not . . . found until December 3, 2011, which was almost . . . four months later." The judge granted defendant's motion for a mistrial without prejudice, explaining:

> Sometimes when we wind up getting involved in the give and take of a trial, the heat of combat overwhelms our rational decision making processes, and . . . that may very well have been the situation today. I don't believe that the last question that was posed to [Brooks] was directly intended to impeach the credibility of the defendant. As I said, even though [defendant] had not even testified as yet, or even made an election in that regard, or was consciously thought of by the prosecution as calling into question the defendant's right to remain silent guaranteed to him under the Fifth Amendment to the Constitution. So, I'm not going to dismiss this case with prejudice.

The trial court did not clearly err when it found that the prosecutor did not intend to create the conditions sufficient to justify declaration of a mistrial. Defendant's argument to the contrary is premised on the theory that the "first trial was not going well" for the prosecution because it "had no idea what its own witnesses were going to say" and the police "had not . . . investigated the evidence found at the scene, including an empty gun holster." In an effort to buy more time, defendant argues, the prosecutor deliberately asked Brooks a question, concerning defendant's failure to come forward during the investigation, that violated defendant's constitutional right against compelled self-incrimination.

On appeal, the prosecution argues that the question was not designed to draw a motion for a mistrial, and further that the question did not violate defendant's constitutional rights because it concerned his prearrest silence. "No person . . . shall be compelled in any criminal case to be a witness against himself." US Const, Am V; Const 1963, art 1, § 17. This privilege is violated when the prosecution comments on a defendant's postarrest, post-*Miranda*[1] silence. *Doyle v Ohio*, 426 US 610, 611; 96 S Ct 2240; 49 L Ed 2d 91 (1976); *People v Borgne*, 483 Mich 178, 186-187; 768 NW2d 290 (2009). However, a defendant's prearrest silence, as well as his silence after arrest but before he receives *Miranda* warnings, may be used against him because the "use of a defendant's silence only deprives a defendant of due process when the government has given the defendant a reason to believe both that he has a right to remain silent and that his invocation of that right will not be used against him." *Fletcher v Weir*, 455 US 603, 606-607; 102 S Ct 1309; 71 L Ed 2d 490 (1982); *Jenkins v Anderson*, 447 US 231, 240; 100 S Ct

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

2124; 65 L Ed 2d 86 (1980) ("[N]o governmental action induced [the defendant] to remain silent before arrest."); *Borgne*, 483 Mich at 187-188.

"Neither the Fifth Amendment nor the Michigan Constitution preclude[s] the use of prearrest silence for impeachment purposes." *People v Clary*, 494 Mich 260, 266; 833 NW2d 308 (2013) (internal punctuation omitted). "[W]here a defendant has received no *Miranda* warnings, no constitutional difficulties arise from using the defendant's silence before or after his arrest as substantive evidence unless there is reason to conclude that his silence was attributable to the invocation of the defendant's Fifth Amendment privilege." *People v Solmonson*, 261 Mich App 657, 665; 683 NW2d 761 (2004).

Defendant appears to take for granted the fact that the prosecutor violated his right against compelled self-incrimination, citing case law holding that a retrial is barred if a defendant's motion for a mistrial is prompted by prosecutorial misconduct, but offering no authority to support his position that the prosecutor's question to Brooks—"In this case, would you have enjoyed talking to the [d]efendant?"—actually constituted misconduct or was contrary to case law interpreting the Fifth Amendment and its counterpart in the Michigan Constitution. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Payne*, 285 Mich App 181, 195; 774 NW2d 714 (2009).

Because the prosecutor's question referred to defendant's failure to present investigators with an explanation that he acted in self-defense, that is, before he was arrested or received *Miranda* warnings, and because there was no indication that he was invoking his Fifth Amendment right to silence, evidence of defendant's prearrest silence was admissible as substantive evidence of his guilt, subject to the Michigan Rules of Evidence. *People v Hackett*, 460 Mich 202, 214; 596 NW2d 107 (1999) ("The issue of prearrest silence is one of relevance."); *Solmonson*, 261 Mich App at 665. Defendant's failure to come forward was especially relevant following defendant's cross-examination of Brooks wherein the implication of his line of questions was that defendant was falsely accused as the result of an inept police investigation that failed to uncover the gun that was fired toward defendant. Because the prosecutor's question was proper, the question was not misconduct, and, therefore, there was no basis upon which to grant defendant's motion for a mistrial with prejudice.

Defendant next argues that there was insufficient evidence to sustain his convictions of second-degree murder and assault with intent to murder. We disagree.

Due process requires that the evidence must have shown the defendant's guilt beyond a reasonable doubt. *People v Harverson*, 291 Mich App 171, 175; 804 NW2d 757 (2010). This Court examines the lower court record de novo, in the light most favorable to the prosecution, to determine whether a rational trier of fact could have found that the evidence proved each element of the crime beyond a reasonable doubt. *Id.*

"In order to convict a defendant of second-degree murder, the prosecution must prove: (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *People v Roper*, 286 Mich App 77, 84; 777 NW2d 483 (2009) (internal quotations

omitted). "Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful [sic] disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *Id.* "Malice may be inferred from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm." *Id.* (internal quotations omitted). Malice may likewise be "inferred from the use of a deadly weapon." *People v McMullan*, 284 Mich App 149, 153; 771 NW2d 810 (2009), aff'd 488 Mich 922 (2010). "The offense of second-degree murder does not require an actual intent to harm or kill, but only the intent to do an act that is in obvious disregard of life-endangering consequences." *Roper*, 286 Mich App at 84.

"The elements of assault with intent to commit murder are: (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005) (internal quotations and footnote omitted). The malice element of second-degree murder is necessary, but not sufficient, to satisfy the intent element of assault with intent to murder. *Brown*, 267 Mich App at 148-149.

Defendant's only argument against the sufficiency of the evidence is that the prosecution's witnesses "were hiding or trying to hide the fact that they were carrying or using firearms" on the night of the shooting, and that their testimony was "often incomplete and inconsistent."[2] However, the weight of the evidence, the credibility of witnesses, and what inferences can be fairly drawn from the evidence are questions that are resolved by the jury. *People v Eisen*, 296 Mich App 326, 331; 820 NW2d 229 (2012); *People v Kissner*, 292 Mich App 526, 534; 808 NW2d 522 (2011).

There was sufficient evidence for a rational trier of fact to have found each element of second-degree murder and assault with intent to murder proved beyond a reasonable doubt. Four witnesses saw defendant shoot Thomas. Madison said that defendant and Thomas were approximately four feet apart. The witnesses agreed that defendant fired at least three and as many as five shots. Defendant threatened Madison with a gun after a confrontation approximately two weeks before the shooting involving defendant's having thrown a drink at Madison, and, on the night of the shooting, was overheard making threatening comments relating to robbing the club and repeatedly refused to be searched for weapons. Regarding the intent element of assault with intent to murder, *Brown*, 267 Mich App at 147, the jury could rationally have concluded that defendant bore a grudge against Madison—for the drink-throwing incident two weeks before the shooting, for refusing to allow defendant to enter the club with his revolver, and for physically removing him from the club upon his refusal to be searched—and therefore had the requisite intent to kill Madison.

Notwithstanding the prosecution's "burden of disproving the common law defense of self-defense beyond a reasonable doubt," *People v Dupree*, 486 Mich 693, 710; 788 NW2d 399

[2] Defendant does not cite to the lower court record in this issue. "Facts stated must be supported by specific page references to the transcript, the pleadings, or other document or paper filed with the trial court." MCR 7.212(C)(7); *People v Petri*, 279 Mich App 407, 413; 760 NW2d 882 (2008).

(2010), defendant's theory of self-defense was implausible. It began with his admission that he refused to be searched for no apparent reason, continued with his statement that Madison then grabbed him for no apparent reason, and concluded with his failure, for approximately four months, to inform police that he acted in self-defense and that Gary held the gun that defendant maintained was used to fire at him. Reviewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found that the elements of second-degree murder and assault with intent to murder were proved beyond a reasonable doubt.

Defendant next argues that the prosecutor committed misconduct during closing argument by twice referring to defendant's prearrest silence. We disagree.

"In order to preserve an issue of prosecutorial misconduct, a defendant must contemporaneously object." *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). This issue is not preserved because defendant did not object during closing argument. "Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting substantial rights." *People v Brown*, 294 Mich App 377, 382; 811 NW2d 531 (2011). A plain error affects a defendant's substantial rights if the error affected the outcome of the proceedings. *People v Vaughn*, 491 Mich 642, 665; 821 NW2d 288 (2012). "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). Reversal is not required "where a curative instruction could have alleviated any prejudicial effect. Curative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements." *Id.*

"Given that a prosecutor's role and responsibility is to seek justice and not merely convict, the test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). Defendant claims that a "prosecutor has a duty to not ask the jury to consider" a defendant's silence, citing no law in support of that statement.[3] Although that is the general rule, *Borgne*, 483 Mich at 186-187, the prosecution is entitled to use a defendant's prearrest silence, both for impeachment purposes and as substantive evidence of guilt, without offending the Fifth Amendment or the Michigan Constitution. *Clary*, 494 Mich at 266; *Solmonson*, 261 Mich App at 665. The first excerpt of closing argument to which defendant refers—"And then [defendant] hid out for four months before the Fugitive Apprehension Team finally found him in another county. Does that sound to you like he had an honest and reasonable belief that he had to do what he did?"—was designed to impeach defendant's credibility following his testimony that he acted in self-defense.

In the second excerpt defendant claims was erroneous, the prosecutor said:

> [Defendant] also admitted he ran away, he spent a night in the alley; that he either threw away or lost the murder weapon that night; that he talked to lawyers almost right away; that he didn't turn himself in; that he didn't reach out

[3] "Argument must be supported by citation to appropriate authority or policy." MCR 7.212(C)(7); *Payne*, 285 Mich App at 188.

> to anybody in law enforcement prior to his arrest and say, ["H]ey, you got this thing wrong. I know you're looking for me. You don't know what's going on.["] He agreed to [sic] all of that. He wants us to believe he did that on advice of counsel?

This was a proper use of defendant's silence, before he was arrested and given *Miranda* warnings, in response to his claim that he did not come forward for four months as a result of speaking to a lawyer he did not retain. "[N]onverbal conduct by a defendant, a failure to come forward, is relevant and probative for impeachment purposes when the court determines that it would have been 'natural' for the person to have come forward with the exculpatory information under the circumstances." *Clary*, 494 Mich at 285 n 12. Because the prosecutor's commentary on defendant's prearrest silence conformed to case law interpreting the constitutional right against compelled self-incrimination, defendant has not demonstrated misconduct.

Affirmed.

/s/ Jane E. Markey
/s/ David H. Sawyer
/s/ Kurtis T. Wilder